Aimee Dean Sandell
[illegible] Ave. #2
[illegible], CA [illegible]

Kent Charles Harrold
Attorney
[illegible] Twelve Locust
Post Office
[illegible], CA [illegible]
representing Respondent
People of the [illegible]

Kenneth K. Cooley
Attorney at Law
[illegible] St., Suite 302
[illegible], CA 93301

Appellate Defenders, Inc.
Appellate Attorney
[illegible] Street

California Court of Appeal
Fifth Appellate District
2424 Capitol Street
Fresno, CA 93721

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July [illegible], 2015, at Twin Peaks, California.

[illegible]
[illegible]
Declarant

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ARLENE DENA SANDERS, et al. Defendants and Appellants.	S094088

APPELLANT MCDANIEL'S RESPONSE BRIEF ON THE MERITS

INTRODUCTION

In the court of appeal, appellants Arlene Sanders and Kenton McDaniel successfully challenged the denial of their motion to suppress illegally seized evidenced. This court has granted review in order to resolve the question of whether an otherwise unlawful warrantless search of a private residence may later be justified by the fact that a parolee resides in that home, even if the police were unaware of the resident's parole status at the time of the search. Appellant McDaniel urges this court to take this opportunity to overrule the untenable decision in *In re Tyrell J.* (1994) 8 Cal.4th 68. At a minimum, this court should restrict *Tyrell J.* to the facts presented in that case, and extend the protections of *People v. Robles* (2000) 23 Cal.4th 789 to parolees and their families.

ISSUES PRESENTED

This court has requested that the parties brief three issues.

(1) Whether this court should reconsider the holding of *In re Tyrell J.*, *supra*, 8 Cal.4th 68, 74, that an otherwise illegal search of a minor who is subject to a probation search condition is not unconstitutional despite the officer's ignorance of the search condition?

(2) If this court's holding in *Tyrell J.* remains viable, should it apply to adult parolees who are subject to search conditions?

(3) Under this court's previous decision in *People v. Robles, supra*, 23 Cal.4th 789, does the admissibility of the fruits of the search in the present case differ as to defendant Sanders, who was not subject to a search condition, as compared to defendant McDaniel, who was?

STATEMENT OF THE CASE

On May 17, 1999, appellants Kenton McDaniel and Arlene Sanders were charged by Kern County information number 77313 with possession of cocaine base for sale (Health & Saf. Code, sec. 11351.5), on April 6, 1999. (CT 50, 52.)[1/] As to McDaniel only, the information alleged that he had been previously convicted of the same offense on May 9, 1997, within the meaning of Health and Safety Code section 11351.5. (CT 51.)

On May 26, 1999, appellant Sanders moved under Penal Code section 1538.5 to suppress illegally seized evidence. (CT 56.) On June 1, 1999, counsel for McDaniel joined in that motion and filed a supplemental motion on McDaniel's behalf. (SCT 5, 7.) Following a hearing, both motions were denied on June 24, 1999. (SCT 11-13.)

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1. "'CT" refers to the clerk's transcript on appeal; "SCT" refers to the supplemental clerk's transcript. "RT" refers to the reporter's transcript.

On June 25, 1999, McDaniel pleaded guilty to the charged offense in exchange for a sentence of no more than five years in prison. As part of this agreement, the prior conviction allegation was stricken. (SCT 16-17.)

On August 12, 1999, the court denied probation and sentenced McDaniel to five years in prison. (SCT 21.) On August 31, 1999, McDaniel filed timely notice of appeal. (SCT 25.)

On November 20, 2000, the Fifth District Court of Appeal reversed the convictions of both Sanders and McDaniel, finding that the search of their apartment violated the Fourth Amendment to the United States Constitution. This court granted review on February 26, 2001.

STATEMENT OF FACTS

Appellant McDaniel adopts the following statement of facts recounted in the opinion of the Court of Appeal, summarizing the testimony from the hearing on the motion to suppress:

"On April 6, 1999, Charlotte McKinley was the apartment manager of a complex located at 1905 California Avenue in Bakersfield. That day,

"On April 6, 1999, Charlotte McKinley was the apartment manager of a complex located at 1905 California Avenue in Bakersfield. That day, the residents of apartment 17 informed McKinley that there was a disturbance in apartment 18. McKinley proceeded to call the police.

"Bakersfield police officer Glen Davis responded with Officer Scott Thatcher. Upon arriving, Davis and Thatcher first met with McKinley, who directed them to apartment 18. When they got to the door, Davis and McKinley heard a male and female yelling at each other. Thatcher knocked on the door, and after a short time, someone inside looked out through the blinds, after which the arguing stopped. Davis and McKinley next heard the sound of the deadbolt lock, but the door was not opened. After waiting 15-30 seconds, Thatcher knocked again,

announced the presence of the police, and ordered the door be opened immediately. Another 15-30 seconds passed, the officers heard the deadbolt lock mechanism again engage, and the door was opened.

"Thatcher informed Davis that he observed a cut on Sanders' face, and saw McDaniel standing behind her. Davis described the cut as a "small abrasion[,] like a scrape," and testified the cut looked fresh. The two officers entered the apartment, at which point McDaniel was seen taking his hand out from between the couch cushions. Sanders then very quickly advised the police they were not welcome, stating, "What the fuck you all doing in my house? Get the fuck out of my house." Sanders subsequently began grappling with Thatcher. McDaniel walked toward Thatcher, advising him to leave Sanders alone, but Davis intervened, pressing McDaniel against the wall, and telling him to stay out of the situation. McDaniel attempted to push away from Davis a few times, so Davis handcuffed him. Shortly thereafter, Thatcher handcuffed Sanders.

"After both defendants were handcuffed, Davis made a protective sweep of the apartment to make sure there was no one else in the apartment that could endanger his or Thatcher's safety. Davis looked through the living room, kitchen, bathroom, and two bedrooms, limiting his search to areas where a person could be hiding. There was an open closet in one of the bedrooms. Inside the closet, in plain view, Davis observed a pair of brown work boots, one of which had a large amount of plastic bags stuffed inside with small white chunks of cocaine base knotted into the corners. Davis did not seize the items at this time, but rather continued his protective sweep.

"Once the sweep was completed, Davis called police department communication to obtain McDaniel's parole status. After it was determined that McDaniel was on parole, and subject to search, Davis called for a K-9 unit, and another two-man unit to assist in a search of the apartment. apartment door. A pair of stainless-steel-plated scissors, seven inches in length, was retrieved from between the couch cushions. A total of 4.72 grams of cocaine, as well as a gram scale, $390 cash,

and a pager, were seized from the apartment.

"Sanders testified the blemish on her face was the result of numerous fights she had been in previously, and the scar on her face was there long before April 6, 1999. Sanders denied receiving the blemish as a result of a fight with McDaniel. Sanders also testified she could not recall telling the police that she received the scratch on the day of the incident, or that it was a result of running away from McDaniel and falling against a stucco wall. Sanders did not receive medical treatment for her injury." (Slip op., pp. 3-5.)

ARGUMENT

I.

THE RATIONALE OF *IN RE TYRELL J.* HAS BEEN ERODED BY SUBSEQUENT DECISIONS OF BOTH THIS COURT AND THE UNITED STATES SUPREME COURT, AND SHOULD BE OVERRULED

The court has asked the parties to address the issue of whether the court should reverse the holding of *In re Tyrell J.* (1994) 8 Cal.4th 68, in which this court held that a warrantless search conducted without reasonable suspicion may withstand Fourth Amendment scrutiny if the defendant was subject to an involuntary search condition, even if the searching officer was unaware of that search condition. Strongly criticized at the time that it was decided,[2/] the *Tyrell J.* opinion has been further

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2. See, e.g., *In re Tyrell J, supra*, 8 Cal.4th at pp. 90-99, dis. opn. of Kennard, J.; *People v. Robles* (2000) 23 Cal.4th 789, 802-803, conc. opn. of Kennard, J.; *People v. Robles, supra*, 23 Cal.4th at pp. 803-806, conc. opn. of Brown, J.; 4 LaFave, Search and Seizure (3d ed. 1996) § 10.10(e) pp. 791 -792; *Fourth Amendment Protection for Juvenile Probationers in Calfornia, Slim or None?: In re Tyrell J.* (1995) 22 Hastings

undermined by subsequent decisions at both the state and federal level. For the reasons that follow, this court should abandon *Tyrell J.* 's focus on the defendant's subjective expectation of privacy and adopt the more commonly accepted standard of objective reasonableness for parole searches. At the very minimum, this court should overrule *Tyrell J.* to the extent that it purports to legitimize otherwise unreasonable searches undertaken by officers who do not even know of the defendant's parole status.

A. The recent decision of the United States Supreme Court in *United States v. Knights* compels a return to the pre-*Tyrell J.* requirement that parole searches be accompanied by reasonable suspicion

During the past fifteen years, this court has attempted on multiple occasions to craft a cohesive jurisprudence regarding the Fourth Amendment rights retained by probationers and parolees subject to search conditions. With the exception of the 1987 decision in *Griffin v. Wisconsin* (1987) 483 U.S. 868 [97 L.Ed.2d 709; 107 S.Ct. 3164], the court has acted without specific guidance from' the United States Supreme Court.

In December of 2001, however, the United States Supreme Court reviewed a California probationer's search condition in *United Sates v. Knight* (2001) 534 U.S. 112 [151 L.Ed.2d 497; 122 S.Ct. 587]. Although the court in that case ruled that the warrantless probation search at issue was supported by reasonable suspicion and was consistent with the Fourth Amendment, in so holding the court articulated a balancing test that calls into question this court's holdings in *Tyrell J.* and

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Const. L.Q. 893; *In re Tyrell J.*: *Calfornia 's Application of Search and Seizure Limitations to Juvenile Probationers* (1995) 21 J. Contemp. L 307; *Fourth Amendment Protections for the Juvenile Probationer after In re Tyrell J.* (1996) 36 Santa Clara L. Rev. 865; *In re Tyrell J.*: *Children and Their Reasonable Expectations of Privacy* (1995) 25 Golden Gate U.L. Rev. 391.

People v. Reyes (1998) 19 Cal.4th 743. In light of the Supreme Court's reaffirmation of the totality of the circumstances balancing test abandoned by this court in *Tyrell J.*, the time is ripe for a reevaluation of California law.

1. The law prior to *Tyrell J.*

This court first addressed parole searches in the context of the determinate sentencing law in *People v. Burgener* (1986) 41 Cal.3d 505. In upholding a warrantless search supported only by reasonable suspicion, the court rejected both the consent rationale (*People v. Mason* (1971) 5 Cal.3d 759, 765-766; *People v. Icenogle* (1977) 71 Cal.App.3d 576, 583-586) and the "custodia legis" or continuing custody rationale (*People v. Howard* (1978) 79 Cal.App.3d 46, 49; *People v. Hernandez* (1964) 229 Cal.App.2d 143) for warrantless parole searches.

Instead, the court adopted the balancing approach formulated in *Hudson v. Palmer* (1984) 468 U.S. 517 [104 S.Ct. 3194; 82 L.Ed.2d 393]. Noting that both parolees and probationers have a reduced expectation of privacy relative to other members of the community (while still retaining a much greater privacy interest than that retained by prisoners), the court struck a "balance between individual and societal interests in light of the parolee's current status in the community." (*People v. Burgener, supra*, 41 Cal.3d at pp. 530-531.)

In terms of societal interests, the court focused on the Legislature's stated concern with the period following incarceration as" 'critical to successful reintegration of the offender into society,' " and on the state's interest in" 'imposing extensive restrictions' "on the liberty of one who has been found guilty of a crime against the people. (*People v. Burgener, supra*, 41 Cal.3d at p. 531.) The court concluded that the importance of the state's interest in effective parole supervision justified conducting parole searches without warrants and upon a level of suspicion not amounting to probable cause. (*Id.*, at p. 534.)

The court did not go so far as to hold that a parolee retains *no* expectation of privacy, however: "To say that a parolee is

subject to warrantless search is not to say that his privacy interest is so diminished that random searches or searches unrelated to a proper parole supervision purpose are reasonable and constitutionally permissible." (*Id.*, at p. 533.) The court held that because the justification for warrantless parole searches was the need for effective parole supervision, any search conducted pursuant to a person's parole status "must be based on information which leads the parole agent who conducts or authorizes the search to believe that the parolee has violated the law or another condition of his parole, or is planning to do so." (*Ibid.*) In sum, a parole search under *Burgener* had to be directly and closely related to parole supervision, and supported by at least a reasonable suspicion that the parolee had violated the law.

The *Burgener* holding was followed within a year by the United States Supreme Court ruling in *Griffin v. Wisconsin, supra*. The court in that case considered a Wisconsin regulation permitting warrantless searches of probationers' homes based only on a reasonable suspicion. At the outset of its discussion, the court recognized that "[a] probationer's home, like anyone else's, is protected by the Fourth Amendment requirement that searches be reasonable." (*Griffin v. Wisconsin, supra,* 483 U.S. at p. 873;) At the same time, the court cautioned that probationers and parolees are considered "more likely than the ordinary citizen to violate the law." (*Id.*, at p. 880.) The danger of recidivism, and the probation system's goal of rehabilitation, present "special needs, beyond the normal need for law enforcement." (*Id.*, at p. 873.) Such special needs may justify "a degree of impingement upon privacy that would not be constitutional if applied to the public at large." (*Id.*, at p. 875.) The court thus upheld the Wisconsin regulation under what came to be known as the "special needs" exception to the warrant requirement. (*Id.*, at p. 880.)

The *Griffin* "special needs" evaluation was not inconsistent with the balancing test employed by this court in *Burgener*. The next California case on the subject, however, was handed down just two weeks after the *Griffin* decision, and diverged from the

"special needs" analysis as well as from this court's own precedent in *Burgener*. In *People v. Bravo* (1987) 43 Cal.3d 600, this court distinguished consent-based probation searches from nonconsensual parole searches. Focusing on the probationer's reasonable expectation of privacy rather than on the competing needs of society and the individual, the court found that a defendant who agrees to warrantless searches as a condition of probation has not only relinquished the right to demand a warrant, but also "whatever claims of privacy he might otherwise have had." (*Id.*, at p. 610.) The balancing test of *Burgener*, therefore, had no application to probation searches. Given the nearly complete absence of any expectation of privacy by a probationer who had consented to a search condition, the court held that not only could such searches be undertaken without a warrant, but without any reasonable suspicion of wrongdoing. (*Id.*, at p. . 610.)

Thus, when this court decided *Tyrell J.* in 1994, a clear distinction was in effect between the Fourth Amendment rights of parolees and those of probationers. In evaluating the former, this court employed a balancing test not unlike the one adopted by the United States Supreme Court in *Griffin*, in order to determine what quantum of suspicion was required to satisfy the Fourth Amendment where the state evinces special needs for a standard lower than probable cause. In regard to the latter, however, the court instead focused on the expectation of privacy retained by probationers, and found that probationers lacked standing to challenge any search that was not arbitrary, capricious, or harassing.

2. The *Tyrell J.* decision

Tyrell J. presented a legal and factual situation distinct from either *Burgener* or *Bravo*. *Tyrell J.* involved a police officer's search of a minor probationer, undertaken without reasonable suspicion and without knowledge that the minor was subject to a search condition. This court began its discussion by acknowledging the distinction between juvenile and adult

probation. Whereas adult probation is considered an act of leniency to which the defendant voluntarily consents, juvenile probation constitutes a key component of the juvenile court system's reformative and rehabilitative process. (*In re Tyrell J*, *supra*, 8 Cal.4th at pp. 81-82.) Unlike an adult defendant, moreover, a juvenile lacks the option of refusing a probation condition. (*Id.*, at p. 83.) Thus, this court could not and did not rely on the "advance consent" rationale of *Bravo* to uphold the legality of the search in question. (*Ibid.*)

The court likewise found the "special needs" analysis of *Griffin* to be unavailing in this instance, because none of the three factors used to uphold the search condition in *Griffin* was present in *Tyrell J.* Specifically, the factors relied upon by the *Griffin* court were a condition imposed by a state regulation, the necessity of approval for the search by the probation officer's supervisor, and a requirement of reasonable cause to conduct a search. Acknowledging that the search condition imposed upon the minor in *Tyrell J.* was imposed by the juvenile court rather than by a statutory scheme, did not require supervisorial approval, and could be undertaken without reasonable cause pursuant to *Bravo*, the court declined to uphold the search under the *Griffin* test. (*In re Tyrell J.*, *supra*, 8 Cal.4th at p. 78.)

Nonetheless, the court went on to uphold the search, on the theory that "a juvenile probationer subject to a valid search condition does not have a reasonable expectation of privacy over his or her person or property." (*Id.*, at p. 86.) The court reached this unprecedented conclusion by the circular reasoning that since the minor knew that police could randomly search him at any time, he lacked any reasonable expectation of privacy, and that since he lacked any reasonable expectation of privacy, police could search him at any time without reasonable suspicion and without any knowledge of his probation condition. (*Id.*, at p. 89.)

The majority's gauging of the Fourth Amendment inquiry from the vantage point of the minor's expectations was immediately assailed in Justice Kennard's dissent as a "startling departure from settled principles underlying the Fourth

Amendment" that "erodes the credibility of the constitutional prohibition against unreasonable searches and seizures." (*Id.* at p. 43, dis. opn. of Kennard, J.) More recently, Justice Brown also criticized the *Tyrell J.* opinion's divergence from standard Fourth Amendment jurisprudence, arguing that "[t]he flaw of *Tyrell J.* is that it puts the reasonable expectation of privacy cart before the horse." (*People v. Robles*, *supra*, 23 Cal.4th 789, 805, dis. opn. of Brown, J.)

Other commentators have likewise found fault with the syllogism employed in *Tyrell J.*:

> [Q]uite obviously there is no rational basis upon which to uphold otherwise illegal police searches of persons only later determined to be on probation or parole ... Regrettably, that eminently sound position was later abandoned in *In re Tyrell J.* on the bizarre reasoning that a probationer who knows that he is subject to "a valid search condition" to his release consequently "does not have a reasonable expectation of privacy over his person or property" vis-a-vis a search by anyone, including a search by a police officer unaware of the probationer status! (4 LaFave, Search and Seizure, *supra*, § 10.10(e), pp. 79 1-792.)

Given the nearly universal criticism by legal scholars and the lack of explicit or implicit endorsement by the United States Supreme Court, the time is ripe for this court to reconsider *Tyrell J.*

3. Legal Developments after *Tyrell J.*

The shift in approach reflected by *Tyrell J.* paved the way for this court's decision in *People v. Reyes* (1998) 19 Cal.4th 743. In *Reyes*, defendant's parole officer received an anonymous tip that defendant was using drugs. The court of appeal reversed the conviction on the grounds that the search was not supported by reasonable cause. On review, this court overruled *Burgener*

and abandoned the reasonable suspicion standard previously applied to adult parole searches. As in *Tyrell J.*, the court based its decision on the parolee's diminished expectation of privacy, holding that a parolee's right to be free from suspicionless searches is not one which "society is willing to recognize as legitimate." (*People v. Reyes*, *supra*, 19 Cal.4th at p. 751.)

After determining that the United States Supreme Court in *Griffin* had not held that reasonable suspicion was necessarily required in a warrantless parole search (*Id.*, at p. 747), the court next looked to the line of state cases and concluded that the "contextual approach" employed in Tyrell J. was preferable to the rigid formulations of earlier cases. (*Id.*, at p. 750.) Specifically, the court rejected both the consent model of *Bravo* and the careful balancing of interests employed in *Burgener*. "Unlike *Burgener*, which sought to calibrate precisely what level of suspicion could reasonably substitute for probable cause, *Tyrell J.* considered what expectation of privacy could reasonably trigger a requirement for individualized suspicion." (*Ibid.*)

The court once again employed the logic of *Tyrell J.*, noting that, like juvenile probationers, adult parolees already possess a reduced expectation of privacy by virtue of the fact that they are subject to warrantless searches. (*People v. Reyes*, *supra*, 19 Cal.4th at p. 752.) The court found that the threat of a suspicionless search is a reasonable measure to ensure public safety and otherwise effectuate the purposes of parole, and concluded that this compelling need for government intrusion "diminishes any reasonable expectation of privacy." (*Ibid.*) Again, the logic went, societal interests permit parolees to be searched without particularized suspicion; therefore, "even in the absence of particularized suspicion, a search conducted under the auspices of a properly imposed parole search condition does not intrude on any expectation of privacy 'society "is prepared to recognize as legitimate." ' [Citations omitted.]" (*Id.*, at p. 754.) Just as in *Tyrell J.*, the conclusion was that because a parolee could be searched at any time, he had no legitimate expectation of privacy, and because he had no

legitimate expectation of privacy, he could be searched at any time.

Once again, Justice Kennard dissented. Citing *Burgener*, she noted at the outset that parole searches are administrative searches and thus subject to the broad reasonableness requirements of the Fourth Amendment. (*People v. Reyes*, *supra*, 19 Cal.4th at p. 758, dis. opn. of Kennard, J.) Furthermore, she pointed out, the United States Supreme Court has *never* upheld a probation or parole search upon less than reasonable suspicion: "The United States Supreme Court has never held that the Fourth Amendment to the federal Constitution permits warrantless, nonconsensual government searches of private residences without at least reasonable suspicion." (*People v. Reyes*, *supra*, 19 Cal.4th at p. 759, dis. opn. of Kennard, J.) The balancing test employed in *Burgener* was derived from *Griffin*; employing a similar test, the vast majority of other American jurisdictions had retained the requirement of reasonable particularized suspicion for parole searches. (*Id.*, at p. 760, dis. opn. of Kennard, J.)

Justice Werdeger likewise dissented in *People v. Reyes*. Notably, she pointed out that the *Burgener* court had also examined the adult parolee's reasonable expectation of privacy, and had found that such expectation was limited but not absent. (*People v. Reyes*, *supra*, 19 Cal.4th at p. 768, dis. opn. of Werdeger, J.) In contrast with the approach taken by the court in *Tyrell J.* and *Reyes*, however, the earlier decision had incorporated the lowered expectation of privacy into the overall balancing of interests, instead of determining that the reduced expectation answered the entire Fourth Amendment question before the court. (*Ibid.*)

More recently, in her concurring opinion in *People v. Robles*, *supra*, 23 Cal.4th 789, Justice Brown (who authored the *Reyes* opinion) pointed out the danger involved in the overemphasis and circular reasoning derived from *Tyrell J.* Responding to a remark by the Attorney General that upholding the search in *Robles* (a warrantless, suspicionless search of a suspect that was later justified by the discovery that his cotenant

was on searchable probation) would follow the "logical application" of the court's decisions from *Tyrell J.* onward, Justice Brown expressed concern at the direction in which the decisional law appeared to have been headed. Since the probationer had consented to a search of the residence at the time he accepted his probation conditions, the Attorney General argued that the cotenant had assumed the risk of third party consent and had no reasonable expectation of privacy. "The officer's ignorance of the search condition, or even of [the cotenant's] probationary status, was thus immaterial. QED." (*People v. Robles*, *supra*, 23 Cal.4th 789, 803, conc. opn. of Brown, J.)

Justice Brown called this assessment "as syllogistically accurate as it is constitutionally shocking." (*Id.*, at p. 804, conc. opn. of Brown, J.) Further, she argued, the contention "speaks volumes to how far this court's Fourth Amendment methodology has strayed from the core rationale of the guarantee against unreasonable searches and seizures." (*Ibid.*) Her major disagreement with that methodology focuses on the overemphasis of the two-part inquiry regarding a defendant's reasonable expectation of privacy, an inquiry originally derived from Justice Harlan's concurring opinion in *Katz v. United States* (1967) 389 U.S. 347, 360 [88 S.Ct. 507, 516; 19 L.Ed.2d 576] (conc. opn. of Harlan, J.). That inquiry was originally intended to determine the defendant's privacy interest in a physical location, and its application has primarily been focused on that question. (See *People v. Robles*, *supra*, 23 Cal.4th at p. 804, conc. opn. of Brown, J., and citations therein.) The guidance of *Katz* in "defining the scope of the interest protected by the Fourth Amendment" (*Rakas v. Illinois* (1978) 439 U.S. 128, 143 [99 S.Ct. 421, 430; 58 L.Ed.2d 387]) is a guidance as to the *spatial* scope of that interest. (*People v. Robles*, *supra*, 23 Cal.4th at p. 805, conc. opn. of Brown, J.)

While acknowledging that the reasonable expectation of privacy has *some* bearing outside the relatively narrow realm of the *Katz* analysis, Justice Brown nonetheless criticized *Tyrell J.* for "succumbing to the trap of the facile formula that

beguilingly substitutes for critical analysis." (*People v. Robles*, *supra*, 23 Cal.4th at p. 806, conc. opn. of Brown, J.) The inquiry into the defendant's reasonable expectation of privacy, she insisted, "does not define the inquiry into the reasonableness of the search ... because that inquiry looks first to the officer's conduct under the circumstances." (*Ibid.*)

4. The *Knights* decision

In December of 2001, the federal high court at last weighed in on the probation/parole search issue in California, upholding a warrantless search of a California probationer where the search was supported by reasonable suspicion of criminal activity and authorized by a search condition. (*United States v. Knights*, *supra*, 534 U.S. 112 [122 S.Ct. 587; 151 L.Ed.2d 497].) The court first rejected defendant's argument that a warrantless search of a probationer satisfies the Fourth Amendment only if the search constitutes a "special needs" search a la *Griffin*, conducted by a probation officer monitoring the defendant's compliance with probation conditions. (*United States v. Knights, supra*, 151 L.Ed.2d at pp. 590-591.) The court likewise declined to address the government's argument that the defendant's consent to the search condition amounted to "consent in the *Schneckloth* sense of a complete waiver of his Fourth Amendment rights." (*Id.*, 151 L.Ed.2d at pp. 504-505, citing *Schneckloth v. Bustamonte* (1973) 412 U.S. 218 [93 S.Ct. 2041; 36 L.Ed.2d 854].) Instead, the court concluded that "the search of *Knights* was reasonable under our general Fourth Amendment approach of 'examining the totality of the circumstances,' ... with the probation search condition being a salient circumstance." (*United States v. Knights*, *supra*, 151 L.Ed.2d at p. 505.)

The actual holding in *Knights* would not appear at first glance to have great implications for California law in this area, as the court declined to reach the question of whether reasonable suspicion is required for a probation or parole search, and instead merely upheld a search that would have been

permissible in California under *People v. Bravo* and subsequent decisions. The reasoning employed by the court to reach its conclusion, however, is of great importance to this court as it deliberates the fate of *Tyrell J.* and the cases that have followed that decision. This importance stems not from the result reached in *Knights*, but from the process the court used to get to that result, i.e., a reasonableness inquiry assessing the totality of the circumstances, in which the probationer's diminished expectation of privacy was but one factor considered by the court in weighing the interests of society and of the probationer. Such a balancing test was used by this court in *Burgener*; the same approach was strenuously urged upon the court by the dissenters in *Reyes* and *Woods* (*People v. Woods* (1999) 21 Cal.4th 668, cert den, sub nom. *Woods v. California* (2000) 529 U.S. 1023 [120 S.Ct. 1429; 146 L.Ed.2d 319]) and by the concurring opinions in *Robles*. This same balancing test and totality of the circumstances inquiry was abandoned by this court in *Tyrell J.*

In fact, the *Knights* court, like this court in *Burgener*, used the totality of the circumstances test to "calibrate precisely what level of suspicion could reasonably substitute for probable cause," the very approach criticized by this court in *Reyes*. (*People v. Reyes*, *supra*, 19 Cal.4th at p. 750.) Considering the government interest in closely regulating probationers both to integrate them back into society and to monitor their enhanced likelihood of engaging in criminal activity against the probationer's diminished expectation of privacy, the court concluded that "the balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer's house. *The degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable.*" (*United States v. Knights*, *supra*, 151 L.Ed.2d at p. 592; emphasis added.)

The United States Supreme Court's emphasis on reasonableness and the totality of the circumstances is a far

more useful and logical approach than the syllogism with which this court has struggled since its adoption *in Tyrell J.* As will be seen in subsequent portions of this brief, the *Tyrell J.* analysis has already been abandoned to some extent by this court, largely because that analysis has led to the sort of conclusions that Justice Brown termed "constitutionally shocking" in her concurring opinion in *People v. Robles*. Thus, this court should seize this opportunity to overrule *Tyrell J.* and return to the reasonableness inquiry employed under *Burgener*.

As the United States Supreme Court has repeatedly counseled, the touchstone of Fourth Amendment analysis is whether the search at issue is reasonable under the totality of the circumstances. This court concluded in *Burgener* that the competing interests of the parolee versus the interests of the government in monitoring people released from prison permitted a warrantless search upon reasonable suspicion. (*People v. Burgener*, *supra*, 41 Cal.3rd at pp. 530-531.) Reasonable suspicion is likewise the only quantum of proof ever expressly permitted by the United States Supreme court for a warrantless probation or parole search. As Justice Werdeger noted in her concurring and dissenting opinion in *Reyes*, the majority opinion in that case "does not adequately explain why, 12 years ago in *Burgener*, adult parolees enjoyed a greater deal of privacy than they do today." (*People v. Reyes*, *supra*, 19 Cal.4th at p. 768, conc. opn. of Werdeger, J.) The opinion in that case did not explain that change because it was not the level of privacy that changed, but only the court's emphasis on that expectation of privacy.

As will be seen in subsequent portions of this brief, the logical path charted in *Tyrell J.* has proven difficult to navigate in subsequent cases. The *Tyrell J.* opinion is not simply problematic, however; it is wrong. The reasonableness inquiry required under the Fourth Amendment requires an inquiry into the totality of the circumstances, not a simplistic and circular assessment of an individual's subjective privacy interests. This court should follow the guidance of *Griffin* and *Knights* and return to the totality of the circumstances inquiry required by

the Fourth Amendment. In so doing, this court should overrule *Tyrell J.* and abandon that case's flawed reasoning.

B. Even if this court declines to return to the pre-*Tyrell J.* requirement that parole searches be accompanied by reasonable suspicion, it should overrule *Tyrell J.* at least insofar as it permits searches undertaken without knowledge of the defendant's parole status.

While the reasoning in *Knights* would seem to compel a reevaluation of *Tyrell J.* and the cases that have relied on that decision, this court does not have to completely overrule *Tyrell J.* in order to uphold the court of appeal's decision in this case. Instead, this court can continue upon the course it charted in *People v. Robles*, and limit the decision in this case to overruling *Tyrell J.* only insofar as it applies to parole conditions of which the police were unaware at the time of the search. Indeed, any other result would create an irreconcilable conflict with this court's own recent precedent.

Probation and parole searches have historically been given special status under the Fourth Amendment because courts believe that permitting such searches upon a showing of less than probable cause furthers both the societal protection and rehabilitation goals of probation and parole. For instance, part of the balancing test employed by this court in *Burgener* and reiterated in *Bravo* involved a consideration of whether the warrantless search at issue is conducted for a purpose that furthers the purposes of parole or probation supervision. (*People v. Burgener*, *supra*, 41 Cal.3d at pp. 533-534; *People v. Bravo*, *supra*, 43 Cal.3d at p. 610.) More recently, although the federal court in *Knights* held that the Fourth Amendment does not require that a search pursuant to a probation condition be conducted fora "probationary purpose," the court's finding that the search was reasonable under the totality of the circumstances was largely based on the state's need to supervise, monitor, and rehabilitate probationers. Although the search in

that case related to investigation of a new offense, the court focused on the state's need to more closely monitor probationers because they are more likely to commit new offenses than are other citizens. (*United States v. Knights*, *supra*, 151 L.Ed.2d at p. 506.) Thus, even in *Knights*, the court did consider whether the search furthered the very interests that permitted its warrantless execution.

By contrast, there can be no furtherance of probation or parole supervisory interests where the officer conducting the search does not even know of the existing search condition. This court acknowledged this in *People v. Robles*, citing *Bravo* for the proposition that even a search undertaken pursuant to a consensual probation condition must be reasonably related to the purposes of probation. (*People v. Robles*, *supra*, 23 Cal.4th at p. 797, citing *People v. Bravo*, *supra*, 43 Cal.3d at p. 610.) *Robles* involved a search of the suspect's residence, conducted without a warrant and without the suspect's consent. After the search, police learned that the suspect's brother, who resided with him, was currently on searchable probation. In finding that the search violated the Fourth Amendment and that it could not be justified by the previously undiscovered search condition, this court concluded that "a search of a particular residence cannot be 'reasonably related' to a probationary purpose when the officers involved do not even know of a probationer who is sufficiently connected to the residence." (*People v. Robles*, *supra*, 23 Cal.4th at p. 797.)

The decision in *People v. Robles* marked the first time that a majority of this court broke from the strict reasonable expectation of privacy analysis articulated in *Bravo* and in *Tyrell J.* In fact, just a year before the *Robles* decision, the court upheld the conviction of a non-probationer on the ground that the warrantless search of her home was justified by her cotenant's probation search condition, and that the non-probationer lacked an expectation of privacy in shared portions of the home. (*People v. Woods*, *supra*, 21 Cal.4th 668.) Under the facts of that case, the investigating officer had received information that the probationer's boyfriend was

selling drugs out of their shared home. The officer later observed suspicious behavior by the boyfriend, leading to the boyfriend's arrest. The officer then returned to the home and searched it pursuant to the girlfriend's probation condition. (*Id.*, at pp. 681-682.)

In upholding the search and subsequent conviction of the probationer's roommates, this court cited *Bravo* in noting that authority fora consent search arises from the probationer's consent. (*People v. Woods, supra*, 21 Cal.4th at p. 674.) Where multiple parties occupy the same premises, any party may give consent to search areas of common control. Thus, this court reasoned, the cotenant assumes the risk that a roommate might authorize search of common areas. (*Id.*, at p. 676.) Significantly, however, the *Woods* opinion also noted that whatever the officer's motives might have been in that case, the objective evidence before the court showed that drugs and weapons were likely present in the probationer's house. These facts would have furnished ample justification for conducting a probation search; the court thus extended the United States Supreme Court's holding in *Whren v. United States* (1996) 517 U.S. 806 [116 S.Ct. 1769; 135 L.Ed.2d 89] to hold that the officer's subjective intent was irrelevant even where the search was based on less than probable cause. (*People v. Woods*, *supra*, 21 Cal.4th at p. 681.)

In *Robles*, this court explained its *Woods* decision by noting that under both cases, the inquiry is *whether the objective facts* show a proper probationary justification for the search. (*People v. Robles*, *supra*, 23 Cal.4th at p. 797.) If the answer is yes, the officer's subjective motives are irrelevant. In *Woods*, the officer conducted the probation search based on a known probation condition, and with knowledge of objective facts indicating that drugs would be found in the probationer's home. Conversely, where the objective facts demonstrate no plausible parole or probation purpose for the search, no knowledge of the search condition, and no other justification for the search, the search cannot be justified by a subsequently discovered search condition:

> [I]f officers lack knowledge of a probationer's advance consent when they search the residence, their actions are wholly arbitrary in the sense that they search without legal justification and without any perceived limits to their authority. (*People v. Robles*, *supra*, 23 Cal.4th at p. 797.)

Although *Robles* acknowledged that *Tyrell J.* "declined to impose a strict requirement that the searching officer must always have advance knowledge of a search condition," the court distinguished *Tyrell J.* only insofar as that case applied to the probationer himself rather than to a cotenant. (*Id.*, at p. 797-798.) This court did not suggest that a different standard should apply to juveniles or parolees, only that *Tyrell J.* did not control the facts presented in *Robles* because the latter case involved a cotenant, and the cotenant of a probationer or parolee does not suffer the nearly absent expectation of privacy that *Tyrell J.* imposed upon juvenile probationers and adult parolees. (*Id.*, at p. 798.) For instance, cotenants retain a normal expectation of privacy over their persons and over areas that are under their exclusive control. (*Ibid.*, citing *Illinois v. Rodriguez* (1990) 497 U.S. 177, 188-189 [111 L.Ed.2d 148].) Thus, *Tyrell J.* simply did not apply to the facts of *Robles*, so the court had no reason to address the older decision's continued validity.

Despite this distinction, the logic of *Robles* does apply to an adult parolee or a juvenile probationer as well as to adults on probation. A parole search under *Tyrell J.* or *Reyes* is subject to the same limitation as a probation search under *Bravo*, i.e., it must not be undertaken for harassment or for reasons that are wholly arbitrarily. This court in *Reyes* noted that" 'a parole search could become constitutionally "unreasonable" if made too often, or at an unreasonable hour, or if unreasonably prolonged or for other reasons establishing arbitrary or oppressive conduct by the searching officer.' [Citation.]" (*People v. Reyes*, *supra*, 19 Cal.4th at pp. 753-754.) The *Reyes* court defined an arbitrary or capricious search as one undertaken"when the motivation for the search is unrelated to

rehabilitative, reformative or legitimate law enforcement purposes, or when the search is motivated by personal animosity toward the parolee." (*Id.*, at p. 754.) By comparison, *Robles* has defined a warrantless search undertaken without knowledge of the search condition as "wholly arbitrary" (*People v. Robles*, *supra*, 23 Cal.4th at p. 797), and such a search is no less arbitrary if the defendant is on parole rather than probation. Further, just as there can be no legitimate probation reason for conducting a search if the officer does not know that the suspect is on probation and subject to search, there can be no legitimate parole purpose for searching a person whom the officer does not know to be on parole.

The basic distinction which this court drew between the scenario in *Woods* and the scenario in *Robles* is sound. In the former case, the officers had an objectively reasonable basis for conducting a search, i.e., a known probation condition. In the latter case, the officers had no objectively reasonable basis for searching; the existence of the search condition was a fortuitous discovery that saved what would have otherwise amounted to a violation of the Fourth Amendment. (*People v. Robles*, *supra*, 23 Cal.3d at p. 799.) Given the exclusionary rule's purpose of deterring unlawful conduct by police, this court should maintain this reasonable distinction rather than adopting a different rule for parole searches.

Despite the Attorney General's apparent contention to the contrary,[3] this focus on the officer's knowledge does not amount to basing the Fourth Amendment determination on the officer's subjective state of mind. Rather, focusing on the objective facts known to the officer is consistent with settled Fourth Amendment law. In determining the reasonableness of a search undertaken without a warrant, the court may look only to those facts known to the officer at the time the search was made. (*People v. Talley* (1967) 65 Cal.2d 830, 835.) This is not an impermissible focus on the officer's motives or state of mind, but an entirely proper examination of the objective facts

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3. Respondent's Brief on the Merits, p. 11.

available to the officer at the time of the search, consistent with the purposes of the exclusionary rule.

This court should overrule *Tyrell J.* to the extent that it is inconsistent with the decision in *Robles*.

II.
EVEN IF THIS COURT DECLINES TO OVERRULE *TYRELL J.*, THE HOLDING OF THAT CASE MUST BE LIMITED TO PERSONAL SEARCHES OF JUVENILE PROBATIONERS

Although *Tyrell J.* has been criticized by many commentators and appears to rest on shaky constitutional ground, this court may affirm the court of appeal's holding in this case without reaching the continued merits of *Tyrell J.* That decision may be distinguished on both the facts and the law, and this court may decline to extend its authority to adult parolees.

This court has previously held that an unknown parole search condition cannot save what would otherwise be an illegal search. (*In re Martinez* (1970) 1 Cal.3d 641.) The Fifth District below, in fact, relied on *Martinez* in reversing the denial of appellants' suppression motion. In *Martinez*, the defendant challenged a parole revocation based on illegally seized evidence. In determining that the adult authority could not properly consider evidence obtained as a result of an unconstitutional search and seizure, this court addressed the fiction that a parolee remains under constructive custody. Focusing on "the reality of a parolee's conditional freedom" as opposed to the fiction that he remains in prison custody during parole, the court found that a later discovered parole condition could not justify an otherwise unlawful search:

> In the instant case regular police officers undertook the search pursuant to their general law enforcement duties; the officers, at the time of the search, did not even know of defendant's parole status. The

> investigation involved suspected criminal activity, not parole violations. Under these circumstances the officers cannot undertake a search without probable cause and then later seek to justify their actions by relying on the defendant's parole status, a status of which they were unaware at the time of their search. [Citations.]" (*In re Martinez*, *supra*, 1 Cal.3d at pp. 646-647.)

Subsequent decisions in *Tyrell J.*, *supra*, 8 Cal.4th 68, and *People v. Reyes*, *supra*, 19 Cal.4th 743, appeared to have undermined the rationale in *Martinez*, however. (See *People v. Lewis* (1999) 74 Cal.App.4th 662, 668[stating that *Martinez* can no longer be regarded as controlling authority].As discussed above, the officer in *Tyrell J.* was unaware of the search condition at the time that he stopped the minor. This court held that the search was valid due to the minor's lack of any reasonable expectation of privacy, and that the officer's knowledge was therefore irrelevant. (*In re Tyrell J.*, *supra*, 8 Cal.4th at p. 89.) *Tyrell J.* also directly addressed the *Martinez* rationale, finding that case to be distinguishable because at the time of that decision, search conditions were not automatically imposed upon parolees; thus, while the defendant in *Martinez* knew he was subject to search by his parole officer, "he could reasonably expect to be free of arbitrary searches by police officers." (*Id.*, at pp. 88-89.) When this court subsequently held in *Reyes* that "[t]he 'logic of *Tyrell J.* applies equally, if not more so, to parolees' " (*People v. Reyes*, *supra*, 19 Cal.4th at p. 751), it appeared that Marine had been effectively overruled.

However, *Tyrell J.* and *Martinez* may be distinguishable from one another on their facts, since the former involved a juvenile probationer and the latter involved an adult parolee. Further, *Tyrell J.* involved the search of the minor's person while he was outside of his home, whereas *Martinez* involved the search of the parolee's residence. *Reyes* is likewise distinguishable, as the officer in that case knew of the search condition. In fact, the facts of both *Martinez* and the instant case

are closest to this court's more recent decision in *Robles*, in that *Martinez* involved a search of a parolee's home for reasons not related to parole and without knowledge of the parole condition. *Robles* involved the same basic factual scenario, except that the cotenant there was on probation rather than parole.

This court in *Robles* focused its attention on the special protection afforded to the home under the Fourth Amendment:

> "'[Private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable.' [Citations.]" (*People v. Robles*, *supra*, 23 Cal.4th at p. 795.)

This emphasis on the sanctity of the home is consistent with prior Fourth Amendment case law. (See, e.g., *Steagall v. United States* (1981) 451 US. 204, 211, fn. 6 [101 S.Ct. 1642, 68 L.Ed.2d 38].) *Robles* thus reasonably rejected the argument that its decision in *Woods* would permit officers to indiscriminately enter a home without a warrant and without any awareness of a resident's search condition. (*People v. Robles*, *supra*, 23 Cal.4th at pp. 796-797.)

The logic of *Robles* applies with as much force to a parolee as it does to a probationer. *Robles* found that a warrantless search undertaken without knowledge of the search condition was "wholly arbitrary" (*People v. Robles*, *supra*, 23 Cal.4th at p. 797); the focus is on the objective facts known to the officer rather than on the probationer's status, and thus the search is no less arbitrary if the defendant is on parole rather than probation.

Moreover, the policy rationales identified in this court's decision in *Robles* apply with far greater force to adult parolees than they do to juvenile probationers, and particularly to searches conducted in the home. Specifically, this court identified the special importance of the probation system in the state's penal system, quoting *Russi v. Superior Court* in noting that the optimal functioning of the probation system is of

compelling public interest: (*People v. Robles*, *supra*, 23 Cal.4th at p. 799, quoting *Russi v. Superior Court* (1973) 33 Cal.App.3d 160, 168.) The court noted that "[m]any law-abiding citizens might choose not to open their homes to probationers if doing so were to result in the validation of arbitrary police action. If increased numbers of probationers were not welcome in homes with supportive environments, higher recidivism rates and a corresponding decrease in public safety may be expected, both of which would detract from the 'optimum successful functioning' of the probation system."(*People v. Robles*, *supra*, 23 Cal.4th at p. 799.) Obviously this fear is not a concern at all where a juvenile probationer is searched on the street rather than in a home he shares with others. Furthermore, the fear that adult probationers and parolees will not be able to find welcoming homes if those homes are subject to arbitrary searches has no corresponding concern in the juvenile context, as parents generally have an obligation to provide shelter for their minor children.

In sum, important distinctions may be drawn between the pat down search of a minor on a public street undertaken in *Tyrell J.* and the situation in this case, i.e, a warrantless intrusion of a private home shared by an adult parolee and his cotenant. If this court declines to overrule *Tyrell J.*, at a minimum it should extend *Robles* to bar warrantless searches of adult parolees in their homes where the police are unaware of an existing search condition, and limit *Tyrell J.* to the facts decided in that case.

III.
THIS COURT'S HOLDING IN *PEOPLE V. ROBLES* APPLIES EQUALLY TO PAROLEES OR PROBATIONERS AND TO THEIR CO-TENANTS

Although this court's holding in *Robles* on its face applies only to persons who reside with probationers, the principles enunciated in that case apply with equal force to probationers or

parolees themselves where the searching officers have no knowledge of the search condition or parole status. Thus, this court should uphold the appellate court's decision as to appellant McDaniel as well as to appellant Sanders.

Despite its discussion of the differing expectations of privacy of the person subject to the search condition and the people who simply reside in the same house, the *Robles* decision was largely based on considerations that apply equally to both McDaniels and his coappellant. *Robles* emphasized the sanctity of the home and the desirability of deterring wholly arbitrary police conduct. The court distinguished between the *Tyrell J.* situation where the search occurs on the street, and the search of a persons shome, and pointed out the different concerns in each situation.

Specifically, the court highlighted the purpose of the exclusionary rule, i.e.,"'to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures,' [Citations]" (*People v. Robles*, *supra*, 23 Cal.4th at p. 799.) In *Tyrell J.*, the court concluded that abandoning a strict "knowledge-first"rule would not encourage law enforcement officials to engage in warrantless searches of juveniles, because officials would run the risk that any contraband found would be inadmissible in court if the juvenile turned out to not be subject to a parole condition. Thus, the court concluded, police officers have sufficient incentive to avoid an improper search of a person. (*People v. Robles*, *supra*, 23 Cal.4th at p. 799, citing *In re Tyrell J.*, supra, 8 Cal.4th at p. 89.)

The court held, however, that residential searches "present an altogether different situation." (*People v. Robles*, *supra*, 23 Cal.4th at p.800.) Because a home may be shared by multiple people, including friends, family, and guests, permitting prosecutors to validate warrantless residential searches after the fact by showing that an occupant is subject to a search clause "would encourage the police to engage in facially invalid searches with increased odds that a justification could be found later." (*Ibid.*) This scenario, reasoned the court, would create a

significant potential for abuse since the police, in effect, would be conducting searches with no perceived boundaries, limitations, or justification. (*Ibid.*)

> The potential for abuse, with its consequent impact on the citizenry, is especially heightened in high crime areas where police might suspect probationers to live. Thus, while society generally has an interest in having all probative evidence before the court, in circumstances such as these a knowledge-first requirement is appropriate to deter future police misconduct and to effectuate the Fourth Amendment's guarantee against unreasonable searches and seizures. [Citation.]" (*People v. Robles*, *supra*, 23 Cal.4th at p. 800.)

This goal would be significantly undermined if evidence seized during a search could be used against some occupants of the home but not against others. Restricting the holding in *Robles* to apply only to those who reside with probationers or parolees would largely eliminate the effect of deterring police misconduct. In fact, allowing evidence seized against a parolee during a warrantless, suspicionless search of his home with no prior knowledge of his status encourages the very sort of police conduct that this court tried to forestall in *Robles*. The court of appeal summarized the danger of this result: "The end result is that while non-parolee residents may vindicate their Fourth Amendment rights, they will still be forced to endure warrantless, suspicionless searches of their homes because the police can hope that someone in the home will be on probation or parole." (Slip op., p. 17.)

The *Robles* decision rested on sound public policy concerns and is consistent with the most basic principles of the Fourth Amendment and the exclusionary rule. This court should not undermine that holding by arbitrarily limiting its reach.

CONCLUSION

For the reasons stated above, appellant Kenton McDaniels asks this court to affirm the decision of the Court of Appeal. Specifically, McDaniels urges the court to overrule the decision in *In re Tyrell J.*, bringing California's Fourth Amendment jurisprudence back into line with federal standards and readopting the balancing test articulated in *People v. Burgener* and *United States v. Knights*. In the alternative, McDaniels urges the court to limit the reach of *Tyrell J.* to the factual scenario presented in that case, i.e., a juvenile probationer searched outside of his home. Finally, McDaniels asks the court to refuse to arbitrarily limit its holding in *People v. Robles* to people who reside with probationers and parolees, because to do so would greatly undermine the purposes articulated in that cases.

Dated: July 22, 2002

Respectfully submitted,

[Signature]
CENTRAL CALIFORNIA
APPELLATE PROGRAM
GEORGE BOND
Executive Director
ELIZABETH CAMPBELL
State Bar No. 166960
2407 J Street, Suite 301
Sacramento, CA 95816
(916)441-3792
Attorneys for Appellant
Kenton Michael McDaniel

APPENDIX C

Court of Appeal 2nd Crim. No. B148489

IN THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION SIX

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DANIEL BARRON, Defendant and Appellant.	Court of Appeal 2d. Crim. No. B148489 (Ventura County Case No. 2000102189)

FROM THE SUPERIOR COURT OF VENTURA COUNTY
THE HONORABLE BRUCE CLARK, JUDGE PRESIDING

APPELLANT'S OPENING BRIEF

LYN A. WOODWARD, SBN 149860
Attorney at Law
101 Moody Court, Suite 207
Thousand Oaks, CA 91360
(805) 446-2779

Attorney for Appellant,
DANIEL BARRON

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Court of Appeal 2nd Crim. No. B148489

IN THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SIX

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DANIEL BARRON, Defendant and Appellant.	Court of Appeal 2d. Crim. No. B148489 (Ventura County Case No. 2000102189)

STATEMENT OF THE CASE

A felony information filed October 17, 2000 alleged that appellant committed one count of possession of cocaine on September 15, 2000, a felony in violation of Health & Safety Code Section 11350 subdivision (a). (CT 38-39.)

Appellant filed a motion to suppress evidence on the grounds that the search leading to the discovery of the cocaine violated appellant's Fourth Amendment rights. Specifically, appellant argued that he was searched arbitrarily in violation of the rule set forth in *People v. Reyes* (1998) 19 Cal.4th 229) (CT 1-4; 24; 40-45.) The prosecution claimed appellant's motion failed to comply with the notice requirements of *People v. Williams* (1999) 20 Cal.4th 119, but declined a continuance of the suppression hearing offered by the court as a remedy. (CT 5-12; RT 9, 13.) Following a suppression hearing, appellant's motion was denied. (CT 52; RT 37.) He renewed his motion prior to trial, and the renewed motion was also denied. (CT 40-45; RT 4.)

Appellant entered a guilty plea, imposition of sentence was suspended, and he was placed on probation for three years. (CT 70-72; RT 14.)

STATEMENT OF FACTS

Motion to Suppress

On September 15, 2000, Deputy Chavez of the Moorpark Police Department made a traffic stop of a driver who failed to obey a stop sign. (RT 15.) Appellant was a passenger in the right front seat of the car. While obtaining identification from the driver, Chavez recognized appellant from prior contacts, and knew that he was on probation for narcotics and weapons violations. (RT 16-17.) Chavez obtained identification from the driver, then ordered both appellant and the driver out of the car. (RT 17.) Chavez requested dispatch to run both the driver's name and appellant's name for warrants and probation. (RT 17-18.) Dispatch confirmed that appellant was still on probation. (RT 18.)

Chavez advised appellant that he was going to conduct a search pursuant to the terms of probation. (RT 18, 21.) A pat-down search for weapons yielded nothing. Chavez then ordered appellant to removed his shoes and socks. A small quantity of cocaine fell out of appellant's left shoe. (RT 18-20.) Appellant was then arrested. (RT 20.)

ARGUMENT

THE SEARCH VIOLATED THE FOURTH AMENDMENT AS INTERPRETED BY BOTH FEDERAL AND STATE CASE LAW.

In *People v. Bravo* (1987) 43 Cal.3d 600, the California Supreme Court held that a probationer consents in advance to search of his person and property in exchange for the

opportunity to avoid prison. (*People v. Bravo, supra*, 43 Cal. 3d at 608-609.) Subsequent decisions have confirmed that a probation search violates the Fourth Amendment only if it is arbitrary, capricious or harassing. (*In re Anthony S.* (1992) 4 Cal.App.4th 1000; *People v. Reyes* (1998) 19 Cal.4th 743.) According to the California Supreme Court, the United States Supreme Court has not squarely decided the issue, and Ninth Circuit decisions requiring -- at a minimum -- reasonable suspicion, are not controlling. (*In re Tyrell J.* (1994) 8 Cal.4th 68, 78-79.)

Under California's interpretation of federal constitutional law, then, probationers waive all protection from search and seizure except that which is arbitrary, capricious, or harassing. (*People v. Reyes, supra*, 19 Cal.4th at 753-754.) A search that is arbitrary, capricious, or harassing is one motivated by illegitimate purpose, such as personal animosity, (*In re Anthony S., supra,* 4 Cal.App.4th 1000, 1004, cited with approval in *People v. Reyes, supra,* 19 Cal.4th at 754.)

The problem with the court's application of the arbitrary, capricious or harassing rule here is twofold, First, that minimal measure of privacy does not satisfy the Fourth Amendment. Instead, as federal law requires, a probation search must be supported by reasonable suspicion that the subject of the search has resumed his course of criminal activity. Second, the search here was wholly arbitrary, and thus even under the California rule the motion to suppress should have been granted. Furthermore, the detention was unreasonable because Officer Chavez had no authority to order appellant out of the car and detain him while checking on his probation status.

A. The Fourth Amendment Requires Reasonable Suspicion That a Probationer has Violated the Terms of Probation Before a Search is Permissible

Fourth Amendment suppression issues must be reviewed under federal constitutional standards:

> Under California law, issues relating to suppression of the evidence derived from police searches and seizures must be reviewed under federal constitutional standards. [Citations.] (*People v. Robles* (2000) 23 Cal.4th 789, 794.)

The validity of a search conducted by state law enforcement officers "is ultimately a question of federal law." (*United States v. Davis* (9th Cir 1991) 932 F.2d 752, 758, citing *United States v. George* (9th Cir. 1989) 883 F.2d 1407, 1412.)

Fourth Amendment rights are triggered when there exists a reasonable expectation of privacy, As do California courts, federal courts recognize that probationers have a diminished expectation of privacy. (*See, e.g., United States v. Davis, supra*, 932 F.2d at 758.) Under federal law, a warrantless probation or parole search conducted for proper administrative purposes, to promote the goals of probation or parole, must be supported by reasonable suspicion. (*Id.* at 758; see, e.g., *Toomey v. Bunnell* (9th Cir. 1990) 898 F.2d 741, 744 [warrantless parole searches may be conducted with reasonable suspicion]; *United States v. Giannetta* (1st Cir. 1990) 909 F.2d 571, 577.)

Federal courts also impose a reasonableness requirement where a search is conducted pursuant to a signed waiver allowing search "with or without reasonable suspicion," and under similar statutory schemes. (See, e.g., *United States v. Giannetta, supra*, 909 F.2d 571, 576, relying on *Griffin v. Wisconsin* (1987) 483 U.S. 868. Reasonable suspicion is the *minimum* level of Fourth Amendment constitutional protection. (*Id.*)

"Reasonable suspicion" means "specific and articulable facts" rather than "a mere inchoate and unparticularized suspicion or hunch. " (*Maryland v. Buie* (1990) 494 U.S. 325; see *also United States v. White* (CA DC 1981) 648 F.2d 29, 35; *In re Tony C.* (1978) 21 Cal.3d 888; *People v. Glaser* (1995) 11 Cal.4th 354.)

In *People v. Souza* (1994) 9 Cal.4th 224, the California Supreme Court addressed the question of what factors may be

lawfully considered as a basis for reasonable suspicion. In that case, the Court explained that "the whole picture" must be assessed: the whole picture must yield a particularized suspicion ... that the particular individual being stopped is engaged in wrongdoing.'" (*Id.*)

It is undisputed here that Deputy Chavez was relying solely on appellant's probation terms in conducting the search. The suppression hearing yielded no facts evidencing suspicious behavior of any kind by appellant. He simply happened to be a passenger riding with a driver who failed to stop at a stop sign.

Deputy Chavez testified at the suppression hearing:

"Q: Right. And you did not suspect him [appellant] of any criminal activity when you told him you were going to invoke his probation search terms?

A: Correct.

Q: And the only reason you searched him was to invoke search terms?

A: Yes.

(RT 19.) Under these circumstances, it is clear that appellant was searched for no particular reason whatsoever, other than because the opportunity presented itself.

Even where a person has waived his Fourth Amendment rights in exchange for the privilege of probation, mere coincidental contact with a probationer -- who has in no manner acted suspiciously fails to provide the type of rational basis for a probation search that is required under Ninth Circuit case law and the United States Supreme Court's decision in Griffith, *supra* 483 U.S. at 873-880. Therefore, appellant's motion to suppress should have been granted since the search was not supported by reasonable suspicion that appellant had resumed criminal activity.

B. The Search was Arbitrary.

Although the concept of "arbitrary" is inherent to the "abuse of discretion" standard employed by the Courts of Appeal on review, the term is infrequently defined in California

case law. Ultimately there is a notable lack of case law discussing the Fourth Amendment "arbitrary, capricious or harassing" limitation on probation searches as established in *Reyes*.[1]

Arbitrary is defined according to common usage in this manner: "subject to individual will or judgement without restriction; contingent solely upon one's discretion. (Random House Webster's Collegiate Dictionary, Second Edition, 1997.) Among the few California decisions that have interpreted the concept is Division Six's opinion in *In re Anthony S.*, *supra*, 4 Cal.App.4th at 1002. In that case a minor, Anthony S., had voluntarily agreed to search of his person, residence or vehicle by a probation officer or law enforcement officer with or without a warrant or reasonable cause. The search condition listed specific categories of items that could be the subject of search. (*Id.*) Anthony S. was a member of the Ventura Avenue Gangsters, and the search term had been imposed as part of an earlier declaration of wardship. (*Id.* at 2002-2003.)

One evening in December, 1990, Ventura Police Officers decided to search the homes of several Ventura Avenue Gangsters, including the home of Anthony S. pursuant to juvenile probation agreements. The officers arrived at Anthony S.'s parents' apartment and announced their intent to search for the items listed in the search condition, including stolen property, alcohol, weapons, and gang paraphernalia." (*In re Anthony S.*, *supra*, 4 Cal.App.4th at 1003-1004.)

The minor was not at home, and his bedroom door was locked. With the assistance of the local Fire Department, the door was forced open and an assortment of weapons, drug paraphernalia, possible stolen property, and ammunition were

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1. The concept of arbitrary has also been equated with the "rational basis" standard of review: "A plaintiff must show that [her] dismissal was 'without any discernible rational basis.'" (*Banks v. Dominican College* (1995) 35 Cal.App.4th 1545, 1552; see also, *Santa Monica Beach, LTD v. Superior Court* (1999) 19th Cal.4th 952, 1020, Chin, J., dissenting.)

discovered. (*Id.*)

On appeal, Anthony S. claimed that the search was arbitrary. In addressing that argument, this Court explained that the legal meaning of the term "arbitrary" refers to the executing officer's motivation. (*Id.*, at 1004.) On the facts before it, the search was not legally "arbitrary" but rather was motivated by the officer's decision that a probation search at the minor's home was necessary to ensure compliance with the terms of his wardship. (*Id.* at 1005-1006.)

The facts here are distinguishable from those in *In re Anthony S.* In that case, the officers determined in advance that a search of several gang members' homes was appropriate. Based on that decision, the officers executed the warrantless search provisions upon which the minor's juvenile probation was dependent. Here, in contrast, Deputy Chavez made no such decision regarding appellant prior to the traffic stop. Instead, the traffic stop was executed for reasons wholly unrelated to appellant's probation. It was mere happenstance that appellant, whom Deputy Chavez recognized, was a passenger in a car driven by a person who committed a traffic violation, It was only after the traffic violation detention commenced, and for no particular reason at all, that Deputy Chavez decided to proceed with a probation search.

Moreover, the cocaine was not located even upon a "mere" patdown search for weapons. Instead, Deputy Chavez searched appellant's pockets and, finding no contraband, required appellant to remove his shoes and socks. Under these circumstances, the traffic stop offered a random and arbitrary opportunity to detain and search a probationer. Such a search exemplifies the concept of "arbitrary" explained in *People v. Reyes*.

In comparison, in *In re Bihn L.* (1992) 5 Cal.App.4th 194, an officer stopped a car in which there were several passengers who appeared to be minors. Appellant, who was one of the minors detained, was subject to probation search terms resulting from prior contact with the juvenile court. The detaining officer conducted a pat-down search for weapons of appellant, and

found a loaded pistol. In concluding that the search was not unlawful, the Sixth District found "no clear evidence that the officer did not believe the theory of potential truancy he outlined at the suppression hearing ... (*In re Bihn L.*, *supra*, 5 Cal.App.4th at 206.) The concept of arbitrary was rejected on the grounds that the officer had a reasonable basis to detain and search: the officer believed the minor violated truancy laws.

Similarly, in *People v. Jordan* (1986) 42 Cal.3d 308, the California Supreme Court addressed whether a sentencing judge had exercised its discretion in an arbitrary, capricious, or unreasonable fashion. In answering that question, the Court reviewed the objective factors considered by the trial court, including the appropriate mitigating factors. (*Jordan*, *supra*, 42 Cal.3d at 308.)

In each of these cases -- *Jordan*, *In re Bihn*, and *In re Anthony S.* -- arbitrary is defined by the presence of factors proving its opposite reasonable, considered, discriminate, non-random conduct. Here, in contrast, appellant was initially detained only because he was believed to be on probation. Appellant was then searched, once probation was *confirmed*, simply because Officer Chavez believed appellant *could* be searched. Such a search completely lacks any explanation other than as an arbitrary act. If the concept of arbitrary is to mean anything, it must be understood to prevent random searches that occur only because the opportunity to detain presents itself by mere chance alone.

C. Officer Chavez Violated the Fourth Amendment When He Ordered Appellant Out of the Car and Detained Him to Run a Warrant and Probation Check.

Even if this Court were to find that the search was not arbitrary, it should find that the detention leading to the search was unreasonable, and thus the search itself unlawful.

A passenger in a vehicle stopped for a traffic violation is deemed "detained" within the meaning of the Fourth

Amendment. (*People v. Grant* (1990) 217 Cal.App.3d 1451.) If the initial stop of a vehicle and its operator is lawful, that initial stop is also lawful as to the passenger. (*Id.* at 1460.) The seizure of the passenger is not lawful, however, if extended beyond the time necessary to cite the driver. (*In re Tony C.* (1978)) 21 Cal.3d 888; *People v. Glaser* (1995) 11 Cal.4th 354; *Florida v. Royer* (1983) 460 U.S. 491, 500.) An investigatory traffic stop may not include activities beyond the original purpose of the stop if those activities prolong the stop beyond the time it would otherwise have taken. (*People v. Bell* (1996) 43 Cal.App.4th 754, 767; *United States v. Shabazz* (5th Cir. 1993) 993 F.2d 431, 435-437.)

The test for determining when a detention has occurred is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole . . . . (*Michigan v. Chesternut* (1988) 486 U.S. 567, 573.) Circumstances that demonstrate a detention include display of a weapon, a physical touching, or an officer's language (or tone of voice) indicating that compliance might be compelled. (See, e.g., *In re Cristopher B.* (1990) 219 Cal.App.3d 455, 460, citing *United States v. Mendenhall* (1988) 446 U.S. at 567.)

In *People v. Verin* (1990) 220 Cal. App. 3d 551, the First District held that a police officer's command to defendant to "Hold it. Police." constituted a detention. (*Id.* at 556, citing *People v. Bower* (1979) 24 Cal.3d 638 [When a police officer commands a citizen to stop, the citizen is not longer free to leave and has been detained].)

In *People v. Wilkins* (1986) 186 Cal.App.3d 804, two occupants of a parked station wagon were "seized" when a parol officer parked his vehicle behind the station wagon in such a way as to prevent the occupants' exit. Although the officer did not use the patrol car siren or red lights, a show of authority sufficient to trigger Fourth Amendment protections was implicit in the manner in which the police car blocked the parked station wagon. (*People v. Wilkins, supra*, 186 Cal.App.3d at 809; see also *United States v. Holloway* (5th Cir.1992) 962 F.2d 451 and *United States v. Hernandez* (9th Cir. 1994) 27 F.3d 1403; see

also *United States v. PenaCantu* (5th Cir.1981) 639 F.2d 1228 [agents who pull up behind a stationary car, position themselves on either side of the car, and question the occupants, have detained those occupants] and *State v. Walp* (Ore. 1983) 672 P.2d. 781 [after suspect stops car on shoulder of road, officer causes a detention by pulling up behind suspect and turning on overhead tights].) Similarly, a verbal command to submit to authority, and submission to that command, cannot be interpreted other than as a detention. (*People v. Gonzalez* (1992) 7 Cal.App.4th 381, 383-384 and *People v. Lionberger* (1986) 185 Cal.App.3d Supp. 1.)

The Second District's analysis in *People v. Spicer* (1984) 157 Cal.App.3d 213 in also instructive on the point. In *People v. Spicer*, the Court held that when an officer approaches a passenger, demands identification, and flashes a light toward her purse as she searches for the requested document, the passenger has been detained within the meaning of the Fourth Amendment:

> In the case at bench, Ms. Spicer was contacted as she sat in the passenger seat of an automobile in a residential neighborhood at 1:30 in the morning. Her freedom of movement was practically nil. [Citation.] To say under these circumstances that Ms. Spicer '[remained] free to disregard the [officer's] questions and walk away' [citation] would be to defy what common sense tells us. (*Id.* at 218.)
>
> ... The evidence also supports the conclusion Ms. Spicer's freedom of movement was restrained by a show of authority [Citations.] She was confronted by a uniformed officer almost immediately after the car in which she was riding was stopped. Without any explanation or prefatory remarks, the officer requested her driver's license. (*Id.* at 219)
>
> The officers in that case stopped the vehicle when the

driver caused it to weave between lanes. While the driver was submitting to a field sobriety test with one officer, another officer demanded that the passenger produce her driver's license. As the passenger rummaged through her purse, the officer pointed his flashlight into the car. He observed a handgun in the purse, which he confiscated and determined was loaded. The passenger was arrested and charged with carrying a concealed weapon and carrying a loaded firearm in a public place. (*Id.* at 213-214.)

The trial court granted defendant's motion to suppress, the Superior Court appellate department reversed that ruling, and the Court of Appeal ordered the motion to suppress granted, finding the request to produce a driver's license, coupled with the coercive nature of that request. constituted an unlawful seizure.

The People in Spicer argued that even if the contact with defendant constituted a seizure, the officer's demand for a license was reasonable. The People claimed defendant might have chosen to take possession of the car once the driver was arrested pursuant to Vehicle Code § 22651 subdivision (h). The Court disagreed:

> Of course, even if the premise were established, it would not justify a detention of the passenger in order to determine whether the passenger possessed a valid driver's license. Only a reasonable suspicion of criminal misconduct justifies a detention, (*Id.* at 211, citing *Brown v. Texas* (1979) 443 U.S. 47, 51.)

Here, the case law demonstrates that appellant and the driver were detained for a traffic violation, and that appellant was further detained when Officer Chavez ordered appellant out of the car along with the driver. No reasonable person would have considered himself or herself "free to leave" under such circumstances.

Furthermore, as in *People v. Spicer*, Officer Chavez had no reason to suspect that appellant was engaged in criminal activity

when he ordered appellant out of the car and ran a warrant and probation check. The only reason Officer Chavez detained appellant was to check his probation status and search him.

The question, then, is whether *Reyes*, interpreted in a manner consistent with the Fourth Amendment, permits an officer to detain a potential probationer absent any suspicion of wrongdoing, while the officer conducts a warrant and probation check. Appellant contends that the Fourth Amendment does not authorize such a suspicionless detention solely to confirm probation for purposes of a probation search.

As Justice Kennard noted in dissent in *Reyes*, the Fourth Amendment imposes a reasonableness requirement where a search is authorized by a signed waiver allowing search "with or without reasonable suspicion. " (*Reyes, supra*, 19 Cal.4th at 759-760; *see also*, *United States v. Gianetta* (1st Cir.1990) 909 F.2d 571, 576, relying on *Griffin v. Wisconsin* (1987) 483 U.S. 868.) Moreover, most states interpret the Fourth Amendment as requiring at least *some* degree of suspicion of wrongdoing before an officer may detain a probationer for a probation search. (*See, e.g., Reyes*, 19 Cal.4th at 760-762, J. Kennard dissenting,) Other states limit abuse of probation search terms by allowing only probation officers to conduct such searches. *(Id.* at 762.)

Contrary to the approach outlined by Justice Kennard in dissent in *Reyes*, by Ninth Circuit case law, and by most other states, Deputy Chavez detained appellant without suspicion of wrongdoing solely with the aim of determining whether appellant was still on probation. The purpose of the detention, in turn, was to conduct a probation search if the search terms were still in effect.

To interpret the Fourth Amendment as allowing such a detention of passengers to check for warrants and probation exceeds the bounds of the Fourth Amendment. The detention that occurred here was not part of a "randomly" planned probation enforcement search, nor did it arise from *any* degree of suspicion that appellant might be reoffending, Instead, the detention was justified only by the prospect of discovering that

appellant was still on probation, and thus subject to a suspicionless probation search. Such detention did not meet even the most minimal level of reasonableness under the Fourth Amendment.

D. Appellant Should be Afforded an Opportunity to Withdraw His Plea.

The court's failure to suppress evidence illegally obtained substantially affects a defendant's decision to plead guilty. In *People v. Miller* (1983) 33 Cal.3d 545, the California Supreme Court explained that where a motion to suppress is improperly denied and a defendant subsequently pleads guilty, the remedy is to return to parties to the "status quo" by allowing the defendant to withdraw his plea in light of a corrected legal ruling on the suppression issue. *(Id.* at 555-556.)

This result is proper because, because the court's failure the cocaine was crucial to appellant's decision to plead guilty. A strategic decision to enter into a particular plea bargain "hinges not only on the strength of the prosecution's case, but also upon the probable effectiveness of the defenses and exculpatory evidence available to the accused." *(Id.* at 551.) Thus, on appeal it cannot be determined on a "blank" record whether the error was harmless. *(Id.* at 555-556.)

CONCLUSION.

Because the search of appellant's shoes failed to comply with federal law as interpreted by federal courts, and because even under California's arbitrary, capricious, and harassing standard the search was unreasonable, appellant respectfully requested that his motion to suppress be granted and that he be provided an opportunity to withdraw his plea.

DATED: September 17th, 2001

Respectfully submitted,

[Signature]_____
Lyn A. Woodward
Attorney for Appellant,
DANIEL BARRON

PROOF OF SERVICE

STATE OF CALIFORNIA,
COUNTY OF MONTEREY

I, Lyn A. Woodward, am employed in the County of Monterey, State of California. I am over the age 18 and not a party to the within action. My business address is 309 Prescott Lane, Pacfic Grove. California 93950.

On September 17, 2001, I served the following document, known as **APPELLANT'S OPENING BRIEF (People v. Barron)** in this action by placing a true copy thereof in a sealed envelope addressed as follows:

STATE ATTORNEY GENERAL
5th Floor--North Tower
300 S. Spring St.
Los Angeles, California 90013

California Appellate Project
520 S. Grand Avenue, 4th Floor
Los Angeles, CA 90071

CLERK OF THE SUPERIOR COURT
COUNTY OF VENTURA
800 South Victoria Avenue
Ventura, California 93009-0001
(for delivery to the Honorable Bruce A. Clark,
Judge Presiding)

OFFICE OF THE DISTRICT ATTORNEY
Ventura County
800 South Victoria Avenue
Ventura, California 93009

Daniel Barron
861 Walnut Canyon Rd.
Moorpark, California 93021

Said envelopes were deposited in the mail at Pacific Grove, California. The envelopes were mailed with postage thereon fully prepaid. I am readily familiar with the practice of collection and processing for mailing of the firm by which I am employed. It is deposited with the United States Postal Service on the same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 17, 2001 at Pacific Grove, California.

Lyn A. Woodward [Signature]